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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

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THE PEOPLE,

Plaintiff and Respondent,

v.

CHASE TRENT HENSON,

Defendant and Appellant.

C078639

(Super. Ct. Nos. CM040217,  
CM041086, & CM041455)

Defendant Chase Trent Henson appeals following his no contest plea to first degree residential burglary (Pen Code, § 459),<sup>1</sup> receiving stolen property (§ 496, subd. (a)), possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)), unlawful

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

taking of a vehicle (Veh. Code, § 10851, subd. (a)), and driving in willful or wanton disregard for safety of persons or property while fleeing from a pursuing police officer (Veh. Code, § 2800.2, subd. (a)).<sup>2</sup> The trial court sentenced defendant to an aggregate term of six years in prison and imposed various fines, fees, and assessments. The trial court also ordered defendant to register as a drug offender pursuant to Health and Safety Code section 11590, subdivision (a).

On appeal, defendant contends that the trial court's order requiring him to register as a drug offender was erroneous and must be stricken. He further contends that the trial court's order imposing fees for presentence investigation and reimbursement of defense costs must be reversed because the record lacks substantial evidence that he had an ability to pay these fees. We will strike the order requiring defendant to register as a drug offender. The judgment is affirmed in all other respects.

## **DISCUSSION<sup>3</sup>**

### **A. Drug Offender Registration**

Defendant contends that the trial court's order requiring him to register as a drug offender must be stricken because there is no registration requirement for a misdemeanor conviction under Health and Safety Code section 11377, subdivision (a). The People concede the error, and we agree.

“On November 4, 2014, the voters enacted Proposition 47, the Safe Neighborhoods and Schools Act . . . , which went into effect the next day. [Citation.]”

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<sup>2</sup> Defendant entered a no contest plea to charges in three separate cases: case Nos. CM040217, CM041086, and CM041455.

<sup>3</sup> We dispense with reciting the facts and procedural history of this case because it is unnecessary to resolve the issues on appeal.

(*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) “Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants.” (*Id.* at p. 1091.) The statutes amended by Proposition 47 include Health and Safety Code section 11377. (*People v. Lynall* (2015) 233 Cal.App.4th 1102, 1108.) As amended by Proposition 47, Health and Safety Code section 11377 provides that a violation of that section is a misdemeanor unless the defendant has certain disqualifying prior convictions. (*Lynall*, at pp. 1108-1109.)

Subdivision (a) of section 11590 of the Health and Safety Code states: “Except as provided in subdivisions (c) and (d), any person who is convicted in the State of California of any offense defined in . . . subdivision (a) of Section 11377, . . . shall within 30 days of his or her coming into any county or city, or city and county in which he or she resides or is temporarily domiciled for that length of time, register with the chief of police of the city in which he or she resides or the sheriff of the county if he or she resides in an unincorporated area.” (Health & Saf. Code, § 11590, subd. (a).)

Subdivision (c) of section 11590 of the Health and Safety Code states: “This section does not apply to a conviction of a misdemeanor under Section . . . 11377.”

Here, defendant pleaded no contest to possession of methamphetamine on July 30, 2014. At the sentencing hearing on January 7, 2015, the trial court designated defendant’s conviction as a misdemeanor and sentenced him to one year in custody. The trial court, however, required defendant to register as a drug offender pursuant to Health and Safety Code section 11590, subdivision (a).<sup>4</sup> This was error. The registration

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<sup>4</sup> While defendant did not object to the drug offender registration requirement in the trial court, he may challenge the requirement in this court on the ground its imposition exceeded the statutory authority of the trial court. (See *People v. Brun* (1989) 212 Cal.App.3d 951, 954.)

requirement under this section does not apply to a conviction of a misdemeanor under Health and Safety Code section 11377, subdivision (a). (Health & Saf. Code, § 11590, subd. (c).) Accordingly, the trial court's order requiring defendant to register as a drug offender must be stricken.

**B. Presentence Investigation Fee and Attorney Fees**

Defendant contends that the trial court erred by imposing a presentence investigation fee under section 1203.1b and a fee for reimbursement of defense costs under section 987.8 because the record lacks substantial evidence that he had an ability to pay these fees. He therefore argues that the fees should be stricken, or the matter should be remanded for a hearing to determine his ability to pay. Although he concedes that he failed to object to the fees in the trial court, defendant argues that the forfeiture rule does not apply. Alternatively, to the extent the forfeiture rule applies, defendant contends that trial counsel rendered ineffective assistance of counsel and this court should afford him relief.

**1. Presentence Investigation Fee**

At sentencing, the probation officer recommended that defendant pay a “Presentence Investigation Report” fee in the amount of \$736 under section 1203.1b.<sup>5</sup> In support of this recommendation, the probation officer stated that defendant should have

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<sup>5</sup> Section 1203.1b, subdivision (a) provides, in pertinent part: “[T]he probation officer . . . shall make a determination of the ability of the defendant to pay all or a portion of the reasonable cost . . . of conducting any presentence investigation and preparing any presentence report made pursuant to Section 1203 . . . .” (§ 1203.1b, subd. (a).) Section 1203.1b, subdivision (b) provides, in pertinent part: “The [trial] court shall order the defendant to pay the reasonable costs if it determines that the defendant has the ability to pay those costs based on the report of the probation officer . . . .”

the ability to pay this fee because he “appears able-bodied.”<sup>6</sup> Without discussion, the trial court ordered defendant to pay a “report fee” of \$736.

We conclude that defendant has forfeited his right to challenge the presentence investigation fee. Our Supreme Court recently held that a defendant must assert noncompliance with section 1203.1b in the trial court as a prerequisite to challenging for probation costs on appeal. (*People v. Trujillo* (2015) 60 Cal.4th 850, 858-860.) We reject defendant’s contention that *Trujillo* is distinguishable on the ground that he was sentenced to prison whereas the defendant in *Trujillo* was placed on probation. This distinction was not material to the Supreme Court’s forfeiture analysis. After explaining why the forfeiture rule applied, our Supreme Court noted in the last paragraph of its opinion that “[a] defendant who by forfeiture of a hearing is precluded from raising on appeal the issue of ability to pay probation-related fees is not wholly without recourse.” (*Id.* at p. 860.) The court went on to explain that “[t]he sentencing court as well as the probation officer . . . retain[] jurisdiction to address ability to pay issues throughout the probationary period.” (*Id.* at p. 861.) For instance, the court noted that the trial court “ ‘may hold additional hearings during the probationary . . . period to review the defendant’s financial ability to pay the amount . . . set by the court pursuant to’ section 1203.1b.” (*Id.* at p. 860.) By discussing a probationary defendant’s “recourse” after its forfeiture analysis, we find that such “recourse” was not a basis for the court’s determination that the forfeiture rule applies to a fee imposed for probation costs.

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<sup>6</sup> The probation officer recommended the trial court impose various fees, fines, and assessments. In support of the recommendation, the probation officer stated: “The defendant appears able-bodied. Therefore, he should have the ability to pay any fines, fees, and restitution associated with this case. The defendant did not complete[] a Defendant’s Statement of Assets (CR-115).”

Having concluded that defendant forfeited his ability to challenge the presentence investigation fee on appeal, we turn to defendant's ineffective assistance of counsel argument. In order to establish a claim of ineffective assistance of counsel, the defendant has the burden of demonstrating " 'that counsel's performance was deficient because it "fell below an objective standard of reasonableness [¶] . . . under prevailing professional norms." [Citations.] Unless a defendant establishes the contrary, we shall presume that "counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy." [Citation.]' " (*People v. Lopez* (2008) 42 Cal.4th 960, 966 (*Lopez*).) Defense counsel's failure to object rarely establishes ineffective assistance. (*People v. Avena* (1996) 13 Cal.4th 394, 444-445.)

"[W]hen the reasons for counsel's actions are not readily apparent in the record, we will not assume constitutionally inadequate representation and reverse a conviction unless the appellate record discloses ' "no conceivable tactical purpose" ' for counsel's act or omission." (*People v. Lewis* (2001) 25 Cal.4th 610, 674-675.) " 'If the record "sheds no light on why counsel acted or failed to act in the manner challenged," an appellate claim of ineffective assistance of counsel must be rejected "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation." [Citations.]' " (*Lopez, supra*, 42 Cal.4th at p. 966.) "A claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding." (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267; *People v. Jones* (2003) 29 Cal.4th 1229, 1254 [ineffective assistance claim properly resolved on direct appeal only where record affirmatively discloses no rational tactical purpose for counsel's actions].)

We conclude that defendant failed to establish that trial counsel provided inadequate representation by failing to object to the presentence investigation fee. Because there was no objection to the fee at sentencing, there was no inquiry on the

record into defendant's ability to pay. The record is silent as to why trial counsel did not object to the fee. While the probation report indicates that defendant has no legal residence, no assets, no property, and has never been employed, it also indicates that defendant did not complete a "Defendant's Statement of Assets." Under the circumstances, it is possible that trial counsel may have known facts outside the record that would have supported an ability-to-pay finding. Accordingly, since defendant failed to demonstrate that "there simply could be no satisfactory explanation" for trial counsel's lack of objection to the presentence investigation fee, we reject defendant's claim of ineffective assistance of counsel. (*Lopez, supra*, 42 Cal.4th at p. 966.)

## **2. Reimbursement of Defense Costs**

At sentencing, the probation officer did not recommend that defendant pay a fee for reimbursement of defense costs under section 987.8. However, without discussion, the trial court ordered defendant to pay a "public defender fee" in the amount of \$420.

Section 987.8 permits a court to order a defendant to pay a fee to reimburse some or all of the costs of defense. (*People v. Verduzco* (2012) 210 Cal.App.4th 1406, 1420.) "In any case in which a defendant is provided legal assistance, either through the public defender or private counsel appointed by the court, upon conclusion of the criminal proceedings in the trial court, . . . the court may, after notice and a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost thereof." (§ 987.8, subd. (b).) Upon determining that the defendant does have "the present ability to pay all or a part of the cost" of legal assistance, "the court shall set the amount to be reimbursed and order the defendant to pay the sum . . . in the manner in which the court believes reasonable and compatible with the defendant's financial ability." (§ 987.8, subd. (e).)

" 'Ability to pay' means the overall capability of the defendant to reimburse the costs, or a portion of the costs, of the legal assistance provided to him or her. . . ." (§ 987.8, subd. (g)(2).) In determining a defendant's ability to pay, the court may

consider both defendant's present financial position and the defendant's reasonably discernible future financial position, limited to six months in the future. (§ 987.8, subd. (g)(2).) The court may also consider "[t]he likelihood that the defendant shall be able to obtain employment within a six-month period from the date of the hearing." (§ 987.8, subd. (g)(2)(C).) "Unless the court finds unusual circumstances, a defendant sentenced to state prison shall be determined not to have a reasonably discernible future financial ability to reimburse the costs of his or her defense." (§ 987.8, subd. (g)(2)(B).)

Citing *People v. Aguilar* (2015) 60 Cal.4th 862, the People contend that defendant has forfeited his right to challenge the fee imposed under section 987.8 by failing to object in the trial court. (See *Aguilar*, at p. 866 [holding that defendant forfeited the issue of his ability to pay a fee imposed under section 987.8 by failing to object in the trial court].) Defendant concedes that he did not object to the fee below, but argues that no objection is required to preserve the issue for appeal, citing *People v. Viray* (2005) 134 Cal.App.4th 1186 (*Viray*).

In *Viray*, the Sixth District Court of Appeal carved out an exception to the forfeiture rule with respect to a fee imposed under section 987.8. The court held that forfeiture of a challenge to such a fee cannot "properly be predicated on the failure of a trial attorney to challenge an order concerning his own fees," given the "patent conflict of interest." (*Viray, supra*, 134 Cal.App.4th at p. 1215, italics omitted.) In so holding, the court explained that the forfeiture rule could not be "rationally extended to bar objections to an order for reimbursement of counsel fees, for the reason that unless the defendant has secured a new, independent attorney when such an order is made, [defendant] is effectively unrepresented at that time, and cannot be vicariously charged with [his] erstwhile counsel's failure to object to an order reimbursing his own fees." (*Id.* at p. 1214, italics omitted.) The court reasoned: "In such a situation the attorney cannot be viewed, and indeed should not be permitted to act, as the client's representative. Counsel can hardly be relied upon to contest an order when a successful contest will directly harm

the interests of the person or entity who hired him and to whom he presumptively looks for future employment.” (*Id.* at pp. 1215-1216.) The court held that a challenge to the sufficiency of the evidence to support such a fee “requires no predicate objection in the trial court.” (*Id.* at p. 1217; see also *People v. Verduzco*, *supra*, 210 Cal.App.4th at p. 1421 [where the defendant’s objection to the fee order goes to the sufficiency of the evidence to support the order, no objection need be made in the trial court]; *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1537 [where the defendant is sentenced to prison, an order imposing a fee for reimbursement of defense costs is a sufficiency of the evidence issue that may be raised for the first time on appeal].)

We are not persuaded by the broad conflict of interest analysis in *Viray*.<sup>7</sup> As a practical matter, the reimbursement fee does not go to defense counsel but to the county in which the defendant is prosecuted, (§ 987.8, subd. (e)); counsel will be paid whether or not defendant pays the fee. We are unwilling to presume that defense counsel would be so willing to sacrifice his client’s best interests and thereby violate the rules of professional conduct. (Rules Prof. Conduct, rules 3-110 [duty to act competently], 3-310 [avoid interests adverse to client].)

Since there is no valid reason to disregard the failure to object to the fees in the trial court, the contention they were improperly imposed is forfeited on appeal.

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<sup>7</sup> *Viray* overstates the nature of the conflict of interest inherent in a public defender representing a defendant in connection with a defense costs reimbursement order. We believe a public defender’s interest in reimbursement is too attenuated to prevent a forfeiture, at least without more. There was more in *Viray* - defense counsel himself brought the fee request to the trial court’s attention. Here, by contrast, there was no recommendation by probation and no request by defense counsel.

## **DISPOSITION**

The trial court's order requiring defendant to register as a drug offender under Health and Safety Code section 11590 is stricken. As modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment and to send a certified copy to the Department of Corrections and Rehabilitation.

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/s/  
Blease, Acting P. J.

We concur:

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/s/  
Nicholson, J.

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/s/  
Hoch, J.